

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JAMES ROYALL,

98 CV 1486

Petitioner,

MEMORANDUM

AND

- against -

ORDER

LEONARD PORTUONDO, Superintendent,
Shawangunk Correctional Facility,

Respondent.

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JAMES ROYALL

P.O. Box 700

Shawangunk Correctional Facility

Wallkill, New York 12589

petitioner pro se.

CHARLES J. HYNES

Kings County District Attorney

(Diane R. Eisner, of counsel)

Brooklyn, New York 11201

for respondent.

NICKERSON, District Judge:

Petitioner brought this proceeding under 28 U.S.C.
§ 2254 for a writ of habeas corpus.

He filed the petition in United States District
Court for the Southern District of New York. The case
was transferred to this court on September 22, 1998.
Petitioner was convicted in Supreme Court, Kings
County, New York, of Murder in the Second Degree and
Two Counts of Criminal Possession of a Weapon in the
Third Degree. On March 16, 1988, he was sentenced to
concurrent terms of imprisonment of twenty-five years

to life on the murder count and two and a third to seven years on each of the weapon counts.

On June 17, 1988, he moved to vacate the judgment of conviction. The motion was denied on August 25, 1988. The Legal Aid Society was assigned to represent petitioner on the appeal to the Appellate Division, Second Department. Counsel's brief made two claims, namely, that the court improperly failed to give an accomplice witness charge and that the sentence was excessive. Petitioner thereafter filed pro se a supplemental brief raising claims that (1) the trial court improperly allowed the prosecution to sever a count of the indictment, (2) the search of petitioner's apartment was unlawful, and (3) the prosecutor improperly submitted additional charges to the grand jury after they had voted a true bill on the initial charges. Petitioner also noted that he was incorporating most of the points raised in a brief filed on behalf of his co-defendant.

On April 15, 1991, the Appellate Division affirmed the convictions of both the defendants, holding that the evidence was sufficient to establish guilt on all counts as to both defendants and that the verdict was not against the weight of the evidence. The court also held that petitioner's contention that the trial court erred in failing to give an accomplice corroboration

charge was not preserved for appellate review and that even on the assumption that the witness was an accomplice, any error in failing to give such a charge was harmless in the light of the overwhelming evidence of defendants' guilt. Petitioner's application for leave to appeal was denied by the New York Court of Appeals on August 20, 1991.

On May 31, 1995, petitioner pro se brought another motion in Supreme Court to vacate the judgment, arguing that he had been denied effective assistance of trial counsel. The court denied the motion and found that counsel's representation had been effective.

Petitioner then applied on June 13, 1996, for leave to appeal to the Appellate Division. On September 6, 1996, the Appellate Division denied the application.

Petitioner then filed papers dated December 19, 1996 for a writ of error coram nobis in the Appellate Division. Petitioner argued that his appellate counsel was ineffective because he did not argue that his trial counsel was ineffective. On June 23, 1997, the Appellate Division denied the application.

In this court petitioner makes four arguments: (1) the prosecutor committed misconduct in the grand jury proceedings and at the commencement of trial; (2) the court improperly denied a continuance "to confront

a material witness;" (3) petitioner was denied effective assistance of trial counsel; and (4) petitioner was denied effective assistance of appellate counsel.

1. Petitioner's first claim asserts that the prosecutor prejudiced petitioner by having the grand jury vote on the murder charge in the indictment one day before he presented the evidence relating to the weapon possession counts. Thereafter the prosecutor prejudiced this defendant by obtaining a severance of one of the weapon possession counts prior to trial. Both of these arguments were raised in petitioner's pro se supplemental brief on appeal.

These claims were not raised in the New York Court of Appeals. Petitioner's application simply enclosed the briefs which had been submitted to the Appellate Division but made no arguments. The claims are therefore procedurally barred. See Grey v. Hoke, 933 F.2d 117, 119-20 (2d Cir. 1991).

Since the failure to raise issues before the Court of Appeals precludes further consideration in the New York courts, the claims are exhausted. But this court will not consider the merits of these claims because the petitioner has procedurally defaulted and has not shown any reason that would excuse him. See Bossett v. Walker, 41 F.3d 825, 828-29 (2d Cir. 1994).

In any event, in a federal habeas corpus proceeding petitioner may not collaterally attack errors in the grand jury proceeding where a properly instructed trial jury heard all the relevant evidence and convicted the defendant. Indeed, a claim that the prosecutor erred in asking for a bifurcated vote on the charge in the indictment does not present a federal claim upon which habeas corpus may be granted. Any error in the grand jury is rendered harmless by a subsequent conviction by a trial jury. United States v. Mechanik, 475 U.S. 66, 70, 106 S. Ct. 938, 942 (1986).

In addition plaintiff twice presented to the state courts the claim that the bifurcated grand jury proceeding prejudiced him. On December 29, 1995, the trial court held that the claim not only was barred procedurally but was without merit. The Appellate Division denied leave to appeal.

Because the state court made a finding on the merits and because that finding was not contrary to, nor an unreasonable application of, established federal law as determined by the United States Supreme Court, the 1996 Antiterrorism and Effective Death Penalty Act (the Act), 28 U.S.C. § 2254(d)(1) requires that the petition be denied.

For reasons stated above, the argument that the prosecutor prejudiced petitioner by severing a count of the indictment prior to trial is procedurally barred for failure to raise in the New York Court of Appeals.

Moreover, the claim is wholly without merit. The prosecutor could not conceivably have prejudiced trial by the severance. In addition petitioner's claim is barred under 28 U.S.C. § 2254(d)(1).

2. Petitioner's second claim alleges that he was denied due process because the trial court denied a continuance to the defense for the purpose of calling a witness who allegedly would have testified to what he had been told by a detective whom the prosecutor had planned to call as a witness. The prosecutor did not do so because the detective was ill.

Petitioner did not preserve the point at trial, although his co-defendant did, and did not raise the point in the New York Court of Appeals.

Finally the claim is wholly without merit. There was nothing improper in the denial of the continuance. The witness's testimony would have been inadmissible hearsay and was cumulative to the testimony of another witness.

3. Petitioner's claim that he was denied effective assistance of trial counsel was litigated in his May 31, 1995 motion to vacate. The trial court

addressed the merits of the claim, despite finding that it was based on the record and could have been raised on direct appeal. The court concluded that counsel's representation of petitioner was effective. Leave to appeal was denied by the Appellate Division.

The alleged delinquencies of trial counsel include a failure to make various objections to the trial court's rulings, failure to request certain charges to the jury, failure to cross-examine one of the witnesses, and making an incoherent summation. This court has considered all of these matters and finds them without merit.

The record shows that the state court decision was neither contrary to, nor an unreasonable application of, clearly established federal laws as determined by the United States Supreme Court. Accordingly 28 U.S.C. § 2254(d)(1) requires that habeas corpus be denied on this claim.

4. Petitioner's claim that he was denied effective assistance of appellate counsel was found to be without merit by the Appellate Division. That claim is rejected under 28 U.S.C. § 2254(d)(1).

Petitioner attached to his application for coram nobis dated December 19, 1996, the correspondence between himself and his appellate counsel of the Legal Aid Society, Ellen L. Schutz. In those letters Ms.

Schutz explained to petitioner why the matters which he was urging be argued on appeal should not be included in the brief. The correspondence shows that she had given considerable thought and done considerable research as to the best arguments that could be made on petitioner's behalf in the Appellate Division. She had also discussed petitioner's case with other attorneys in her office, and decided that it was not in his best interests to include in the brief the issues that he pressed upon her. In the end she urged petitioner that if he really wished the Appellate Division to consider those issues, he should write and ask for permission to file a pro se supplemental brief. Petitioner did this, including all the matters he urged upon counsel, and his supplemental brief was before the court.

The petition for habeas corpus is denied.

So ordered.

Dated: Brooklyn, New York
October 20, 1998

Eugene H. Nickerson

Eugene H. Nickerson, U.S.D.J.